Labor and Employment Risk in the Real World: A Practical Guide to Understanding Recent Trends and Laws Intersecting the Construction Industry

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This article aims to serve as a practical guide for employers and attorneys to understand the legal issues facing the construction industry in the area of labor and employment, including topics such as the increasing use of arbitration clauses in employment contracts; LGBTQ, sexual orientation, and gender identification in the workplace; maintenance of privilege during an employer's internal investigation; and specific challenges facing multiple generations operating together in one workforce.

Construction employers, like all employers, are not isolated from the ever-changing landscape of labor and employment law today. Employers are facing increased pressures to conduct investigations in response to employees' complaints of harassment, retaliation, discrimination, and general workplace grievances. They are also encountering specific challenges related to workplace culture including approaching topics such as an employee's sexual orientation and gender identity as we integrate new generations into the workforce. This article covers recent legal updates on these topics and provides some practical advice for employers and their attorneys as they confront this evolving landscape.

Use of Arbitration Clauses in Employment Disputes

Over the past two decades or so, it has become a common practice for employers to mandate the inclusion of employment arbitration agreements in employment contracts for new employees. Arbitration clauses have the benefit of saving employers' time and money by avoiding the complexity of litigation, as well as allowing the parties to have more control over the factfinder, including the ability to select one with specialized knowledge of highly technical fields. Arbitration also avoids the formal processes involved in litigation discovery and provides finality with the decision of the arbitrator, rather than the uncertainty, time, and expense of waiting on an appeal. In general, these mandatory arbitration provisions are understood to favor the employer and, as such, have been the subject of recent judicial scrutiny.

The U.S. Supreme Court most recently addressed the validity of these mandatory arbitration contract provisions in employment agreements in *Epic Systems Corp. v. Lewis*.[1] That case, which was decided in 2018, centered on a conflict between two federal statutes: the Federal Arbitration Act (FAA)[2] and the National Labor Relations Act (NLRA).[3] Enacted in 1925, the FAA was created to ensure the validity and enforcement of arbitration agreements in any "maritime transaction or . . . contract evidencing a transaction involving commerce[.]"[4] The Supreme Court has interpreted the FAA to include the enforcement of arbitration agreements for claims arising under federal statutes, but not for agreements that waive a person's substantive rights guaranteed by another statute.[5] The Supreme Court has also made it clear the FAA promotes the national policy of favoring arbitration and the courts generally uphold these clauses.

In Epic Systems Corp., the Court considered three similar cases, all involving employees seeking to litigate Fair Labor Standards Act (FLSA)6 and state law claims through either class or collective actions. Although the FAA generally requires courts to enforce arbitration agreements, employees argued that the FAA's "saving clause"7 rendered the arbitration agreements both unlawful and unenforceable because the terms of the agreements violated other federal laws, specifically the NLRA. The arbitration agreements, the employees claimed, were unlawful because they required an individualized resolution—with separate proceedings—of disputes and claims that could pertain to multiple or classes of employees.8 Employees based this argument upon section 7 of the NLRA, which guarantees workers

> [t]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.[9]

The Court, in a 5-4 decision, disagreed with the employees.[10] The Court noted that employee arbitration agreements are to be enforced as written and pointed to its responsibility to "give effect to both" the FAA and the NLRA[11] and to enforce the terms of the agreements to which the parties agreed.[12] Neither the FAA's saving clause[13] nor the NLRA could be construed to the contrary. The Court held that while "[t]he policy may be debatable . . . the law is clear: Congress has instruct[ed] that arbitration agreements like those before us must be enforced as written."[14]

Addressing and casting aside employees' arguments, *Epic Systems Corp.* serves as a further protection for employers, ensuring they maintain the ability to enforce terms requiring employees to engage in individual arbitration proceedings to address their disputes, rather than through class or collective litigation. *Epic Systems Corp.* is certain to significantly limit wage and hour class actions and other types of mass disputes against employers that can have large dollar implications.

Efforts to gain the ability to pursue class or collective action despite contrary terms within an employee arbitration agreement did not simply end with *Epic Systems Corp*. In *Lamps Plus, Inc. v. Varela*,[15] the Supreme Court, after disposing of jurisdictional questions,[16] held that courts cannot compel class-wide arbitration based on an arbitration agreement that is ambiguous on the issue of whether the parties agreed to permit arbitration on a class basis.[17] As in *Epic Systems Corp.*, giving effect to the public policy reasons supporting arbitration,[18] the intent of the parties, and mutual consent to the terms of the agreement, the arbitration agreements were found enforceable. The court focused on the importance of the FAA principle that "arbitration is a matter of consent, not coercion,"[19] noting that "courts may not infer consent to participate in class arbitration absent an affirmative contractual basis for concluding that the party agreed to do so."[20] Ambiguity cannot equal consent.[21]

The court also recently addressed the critical question of arbitrability determinations in *Henry Schein, Inc. v. Archer & White Sales, Inc*.[22] When the parties' contract delegates the arbitrability question to an arbitrator, the Court held that courts may not override the contract, even if the court thinks the arbitrability claim is wholly groundless.[23] *Henry Schein* serves as yet another example of the widespread enforceability of arbitration agreements.

Attention on arbitration agreements in employment has been interpreted by the courts as a "victory for employers seeking to arbitrate workplace claims on an individual basis, but also a victory for manufacturers and businesses who prioritize individual arbitration when faced with consumer disputes."[24] Amid this jurisprudence is increased talk that the Court's recent holdings reflect a continued "trend in the direction of creating federal common law on arbitration agreements."[25] From a practical standpoint, employers are generally safe using individualized arbitration agreements. It is wise to take steps to tighten these agreements even more by assuring clear clauses of understanding and acknowledgment by the employee, providing a few days before the first day of employment to review and return the contract, and including an acknowledgment of the time to review and opportunity to review with counsel.

OSHA, Whistleblower, and Arbitration Agreements

Outside of employment agreements mandating arbitration to resolve disputes between an employee and an employer, the Occupational Safety and Health Administration (OSHA) has developed a dispute resolution process for employees who seek redress for workplace safety concerns and potential retaliation under applicable federal U.S. Department of Labor regulations. This dispute resolution process ensures workplace safety concerns are addressed and whistleblowers are protected from retaliation by their employer while avoiding the expense and hassle of litigation. Under this process, the focus of the dispute resolution will be a quick resolution of the whistleblower's complaint, rather than fully investigating the merits of the allegations.[26]

OSHA enforces over 20 whistleblower laws through its Whistleblower Protection Program. In clarifying its enforcement, OSHA has promulgated regulations related to whistleblower activity filed under the Occupational Safety and Health Act (OSH Act).[27] OSHA has created a chart[28] that summarizes all the various laws it enforces as well as timelines and remedies associated with each enforcement. Of the statutes that OSHA enforces, most of the enforcement activity occurs under either section 11(c) of the OSH Act or the Surface Transportation Assistance Act (STAA).[29]

Under the OSH Act, any employee who files a whistleblower complaint regarding workplace safety and who has suffered an adverse employment action following a filing of a complaint with OSHA, participating in an OSHA inspection, or otherwise exercising rights pursuant to the OSH Act is eligible to participate in the alternative dispute resolution (ADR) process. All whistleblower complaints are investigated by investigators who enforce the whistleblower protection laws, irrespective of the dispute resolution process. These investigators receive specific training on how to investigate retaliatory whistleblower complaints and are not the same people who inspect workplaces for enforcement of safety and health hazards.

As part of OHSA's whistleblower investigation, the parties can volunteer to resolve their disputes by participating

in OSHA's ADR process. To do this, both parties must agree to participate in the process, and the program is free to participate in. As opposed to other ADR processes, which are kept confidential, one key difference in participating in OSHA's ADR program is that the settlement agreement is typically subject to a public request under the Freedom of Information Act (FOIA).[30] There are certain exemptions that can apply; however, in general, settlement agreements are subject to FOIA disclosures and therefore parties who utilize the ADR process through OSHA risk the disclosure of the settlement and complaint through the FOIA process.

In addition to OSHA's ADR process, some complaints brought under specific whistleblower statutes are eligible to be resolved through a deferral process that would permit an investigator to recommend an investigation be deferred to another agency or state's decision, grievance proceeding, arbitration, or another appropriate action, rather than being resolved through OSHA's process. This process permits employees to seek redress in other venues and allows for employers to use prior beneficial resolutions to avoid an additional OSHA investigation. For the agency to defer to other proceedings, the factual issues must be substantially similar to the issues raised in the section 11(c) proceeding.[31] Not all whistleblower statutes permit these deferrals, including, namely, STAA since amendments were made to that statute in 2010. However, for the statutes that do permit deferral, it can be beneficial to any employer to avoid a second, or even third, investigation into one allegation. In addition to OSHA's specific dispute resolution processes, "the Secretary also recognizes the national policy favoring voluntary resolution of disputes under procedures in collective bargaining agreements."[32] "By the same token, due deference should be paid to the jurisdiction of other forums established to resolve disputes which may also be related to section 11(c) complaints."[33]

In conclusion, employers and attorneys need to understand the general deference courts have towards enforcing arbitration agreements and the nuances of outside dispute resolution processes as mandated by federal and state regulatory agencies. As the enforceability of mandatory arbitration clauses grows stronger, more and more employers and agencies are seeking to use this alternative form of dispute resolution to avoid costly and time-consuming litigation.

LGBTQ, Sexual Orientation, and Gender Identity in the Workplace

Defined Terms

Before we can fully understand the legal issues surrounding lesbian, gay, bisexual, transgender, and queer (collectively, LGBTQ) employees in the workplace, it is imperative that we understand the language used to identify various categories of individuals and employees.

Gender identity refers to one's internal sense of being male or female, a blend of both, or neither. It is both how an individual perceives themselves and how they publicly refer to themselves.

Gender expression refers to the external appearance of one's gender identity. It includes clothing, hairstyles, voice, behavior, and body characteristics.

Transgender is the term used to identify someone whose gender identity and/or expression is different from those typically associated with their sex at birth. This is different from sexual orientation.

Cisgender is the term for someone whose gender identity matches the sex that they were assigned at birth. For example, someone who identifies as a woman and was assigned female at birth is a cisgender woman. The term *cisgender* is the opposite of the word *transgender*.

A *gender transition* is the period when a person begins to live in accordance with their gender identity. This may include changing their name, taking hormones, having surgery, and changing documents such driver's license, social security record, and birth certificate.

Finally, *sexual orientation* refers to the relative genders of the partners (e.g., heterosexual, gay or lesbian, bisexual). Transgender people can have any sexual orientation. Transgender is not a sexual orientation; it is a gender identity.

Everyone has both a sexual orientation and a gender identity. For example, when someone is categorized as a straight woman, that person has been identified by both orientation (heterosexual) and gender (female).

Current Status of Laws Addressing LGBTQ Employees in the Workplace

For many years, the Equal Employment Opportunity Commission (EEOC) and several federal courts of appeal have interpreted Title VII of the Civil Rights Act of 1964[34]—the law that protects against discrimination on various protected statuses, including sex—to include discrimination based on LGBTQ statuses, such as gender identity or sexual orientation. This was not a universally accepted approach, however. In June 2020, the Supreme Court resolved that dispute in *Bostock v. Clayton County, Georgia*, a consolidated case involving three different lower-court decisions, which held that discrimination relating to one's gender identity or sexual orientation was, in fact, prohibited discrimination on the basis of sex under Title VII.[35]

Prior to the Supreme Court's decision in *Bostock*, several courts recognized discrimination based upon transgender status constitutes discrimination based upon sex stereotyping under *Price Waterhouse v. Hopkins*[36] because discrimination against a transgender individual is motivated by a perceived failure by an individual to conform to expected gender stereotypes, namely, the stereotype that individuals are attracted to people of a different sex and forever present as the gender that matches their biological sex.[37] Other courts determined that discrimination based upon transgender status is discrimination "because of sex" as prohibited by Title VII.[38]

Additionally, many states and municipalities enacted statutes protecting such employees from discrimination and harassment before the *Bostock* decision was issued. As of December 2019, 24 states and the District of Columbia prohibited employers from discriminating against LGBTQ employees.[39] In addition, more than 225 cities and counties had enacted ordinances that prohibited public and private employers from discriminating on the basis of LGBTQ status, including cities such as New York City, San Francisco, Miami, Orlando, Broward County, Tampa, Seattle, Dallas, and New Orleans.

Supreme Court Decisions

In June 2020, the Supreme Court ruled on the issue of whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.[40] In *R.G. and G.R. Harris Funeral Homes v. EEOC*, Aimee Stephens, who worked for R.G. and G.R. Harris Funeral Homes for six years under the name Anthony Stephens, wrote to Thomas Rost, the funeral home operator, explaining that Stephens had struggled with gender identity issues her entire life and intended to have sex reassignment surgery. She told him that "[a]t the end of [her] vacation on August 26, 2013, [Stephens would] return to work as [her] true self, Aimee Australia Stephens, in [gender] appropriate business attire."[41] Two weeks later, the company's owner, Thomas Rost, fired Stephens. Rost acknowledged firing Stephens "because he [Stephens] was no longer going to represent himself as a man. He wanted to dress as a woman," tying the decision to terminate Stephens to the fact that Stephens was assigned, at birth, the gender of male.[42] The Sixth Circuit, reversed the district court decision, finding it "analytically impossible" not to consider a person's sex when deciding to fire them for being transgender, and that discrimination against transgender individuals is inextricably connected to Title VII prohibitions against sex stereotyping.[43]

What appeared to complicate the issue presented in *R.G. and G.R. Harris* for the Supreme Court was the "massive social upheaval" or "the parade of horribles" questions potentially flowing from the case.[44] Justice Gorsuch, during oral argument on October 8, 2019, posed the question, "[w]hen a case is really close, really close, on the textual evidence . . . At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that—that Congress didn't think about it . . ." when the statute was passed?[45] Anticipating the question, respondent Aimee Stephens stated in her reply brief that, although petitioner and the government suggested that resolving the case in favor of Stephens would "make all sex-specific restrooms, dress codes, and other sex-specific rules unlawful," that wasn't the question before the Court:

> The question here is whether firing someone for being transgender or for failing to conform to sex-based stereotypes is "because of sex." That is not a question with respect to sex-specific rules, such as dress codes and restrooms, which on their face treat men and women differently. The lawfulness of these rules therefor turns not on whether they are "because of sex," but on the different question of whether they "discriminate against any individual with respect to . . . terms, conditions or privileges of employment," or "classify . . . in any way which would deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.[46]

In June 2020, in *Bostock v. Clayton County, Georgia,* the Supreme Court held that discrimination relating to one's gender identity or sexual orientation was, in fact, prohibited discrimination on the basis of sex under Title VII.

R.G. and G.R. Harris was consolidated for the purposes of oral argument with *Bostock v. Clayton County*[47] and *Altitude Express, Inc. v. Zarda*.[48] The consolidation ensured the Supreme Court would consider the question of whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of sex" within the meaning of Title VII.

In June of 2010, Zarda,[49] a sky diving instructor, informed a female customer who would be strapped to him for a tandem dive, during which instructors and students are strapped together "hip-to-hip" and "shoulder to shoulder," not to worry because he was gay.[50] Zarda claimed that his work environment often included jests with students about his sexuality to make them more comfortable about the close physical proximity during the dives.[51] The customer then reported that Zarda inappropriately touched her during the dive. The company, Altitude Express, terminated him, representing in Zarda's unemployment claim that the basis for dismissal was because "Zarda shared inappropriate information with [customers] regarding his personal life."[52] Zarda filed a discrimination charge the following month. The district court granted Altitude Express's motion for summary judgment, and after a rehearing en banc, the Second Circuit Court of Appeals reversed and ruled that Title VII protected Zarda. The Second Circuit found that sexual orientation discrimination is a subset of sex discrimination.[53] Altitude Express then appealed to the Supreme Court, and oral argument occurred in the combined cases on October 8, 2019. The Second Circuit's findings to support its decision included that (i) sexual orientation is a subset of sex under Title VII because sexual orientation

is defined by one's sex in relation to the sex of those to whom one is attracted, (ii) sexual orientation discrimination is recognized by the Supreme Court as "rooted in gender stereotypes," and (iii) discrimination on the basis of sexual orientation is prohibited "associational discrimination."[54]

In *Bostock v. Clayton County, Georgia*,[55] a social worker, Gerald Lynn Bostock, claimed he was fired from his job as a social worker after his employer learned of his sexual orientation.[56] His employer, Clayton County, Georgia, contended that Bostock's sexual orientation was not a factor in deciding to terminate his employment, but that he was fired for mismanaging program funds and that his conduct was "unbecoming that of a county employee."[57] Bostock claimed this was a pretext for discrimination based on his sexual orientation.[58] The district court dismissed Bostock's claim, and the Eleventh Circuit affirmed, relying on a recent Eleventh Circuit decision that had leaned on "prior panel precedent" from a 1979 Fifth Circuit case, which found that "discharged based on homosexuality" was not prohibited by Title VII.[59]

With a large split between the circuits on this issue, the decisions in *R.G. and G.R. Harris*, *Zarda*, and *Bostock* were sure to have a significant impact on employers in all sectors and resolve the issue of whether transgender and homosexual individuals are protected under Title VII. Specifically, these cases highlighted the question of whether sexual orientation and/or transgender status falls under the Title VII protected class of "sex." Title VII makes it "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin."

In the most significant decision for LGBTQ rights since the 2015 *Obergefell*[60] decision made same-sex marriage legal nationwide, Justice Neil Gorsuch ruled: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids." In reaching this conclusion, the Court offered a number of analogies and examples to explain its reasoning. One of the examples was as follows:

> Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague.

The impact of this decision on employers will depend on a number of factors. For example, as discussed above, many state and local governments already prohibited discrimination based on sexual orientation and gender identity. Additionally, many employers already prohibited such discrimination or harassment whether it was legally required or not. For such employers, this decision may not impact their day-to-day operations a great deal. Employers that did not operate in such jurisdictions and did not have such personnel policies, though, will want to reevaluate their current company policies and procedures.

Practical Guidance for Employers

In light of the *Bostock* decision, all employers should consider refreshing their antidiscrimination and antiharassment training materials. Such materials should clearly reflect that neither discrimination nor harassment will occur on the basis of sexual orientation or gender identity. Training should be considered for employees on what may be considered discriminatory or harassing behaviors towards individuals identifying themselves on the LGBTQ+ spectrum. For example, some employees and supervisors may not understand the importance of using a person's preferred pronouns or new name. Following this decision, claims based on discrimination against individuals based on sexual orientation or gender identity are certainly more likely to be brought. So, a prompt review of an employer's antidiscrimination and training materials in light of this decision is critical to avoiding potential liability and complying with the employer's legal obligations.

Aside from the obvious prohibitions against outright discrimination (e.g., terminating an employee for his/her LGBTQ status) or harassment (making derogatory remarks to LGBTQ employees), there are many additional areas where employers may need to be sensitive to these issues. As a general rule, employers should follow three overarching principles. First, employers should recognize an employee's self-identity, regardless of that employee's surgical history or documentation. That is, employers should ask themselves whether the person's gender identity and/or sexual orientation is being appropriately recognized in the given situation. Second, understand and apply the concept of reasonable accommodation. Employers should consider whether this is a situation where the typical policies or procedures are resulting in an LGBTQ employee having to unfairly endure difficult or different conditions at work. Third, understand that biases of customers or co-workers are **not** a valid reason for discrimination.

The following discussion highlights a few of the many situations where these principles may come into play.

Restroom Accessibility

Transgender employees should be granted use of the restroom that corresponds to their gender identity. This applies regardless of the amount of surgery or medical treatment the person has had. Employees may choose to use single-occupancy unisex restrooms, but they cannot

be required to do so. Requiring a transgender employee to use specific facilities would segregate them from fellow co-workers and could be viewed as a discriminatory practice. Other employees may need to be trained on why this is appropriate and why it is not a threat to them. If an employee expresses discomfort with a transgender employee's use of the restroom that conforms with their gender identity, the employee expressing discomfort may be directed to a separate or gender-neutral facility, if available.[61]

Use of Preferred Names or Pronouns

Do not "deadname" an employee (use their old name), use the person's "old" pronouns, or allow co-workers to do so. Allowing co-workers not to use the name or pronoun preferred by the transgender employee may constitute harassment of that employee. Employers must be vigilant to ensure that co-workers use correct pronouns and names, and refrain from asking excessively personal questions that would be considered inappropriate if asked to cisgender employees whose identified gender matches the sex they were assigned at birth. Employers should respect an employee's preferred name, pronoun, and title, regardless of the sex assigned at birth, and regardless of whether the employee has identification in that name or has received a court-ordered name change. Employers, however, are not required to use an employee's preferred name on records where the record must match the employee's legal name, such as payroll accounts and insurance documents.

Dress Code Standards

Employers have a right to regulate employee dress or grooming standards that are reasonably related to job requirements. However, LGBTQ employees should be permitted to dress in accordance with the gendered dress standard that is appropriate to their gender identity. Employers who want to implement dress codes would be best served instituting those that require neat, clean, professional appearance, or gender-neutral uniforms—rather than stating that "women" should dress in certain clothing and "men" in other clothing.

Transitioning Employees

When employers learn of an employee who is undergoing a gender transition, the employer should meet with the employee early in the process and discuss the formulation of a transition plan. This plan can then be reduced in writing to a document, signed by both parties, that discusses expectations, agreements, and accommodations with regard to the employee's transition. An important item to discuss may be what information the employee feels comfortable sharing with co-workers or clients, and when. It is helpful for co-workers and clients to be made aware of the change in advance, but it not always necessary. Employees can eventually be informed of the change, the employee's new name, the date of the change, and that the employee should be treated in all respects as his/her new gender. The employer should also express public support for the transition. The plan may also address whether the transitioning employee welcomes the role of educating and answering questions from co-workers or not, as well as issues of privacy and medical information.

Preserving Attorney-Client Privilege During Internal Investigations and Internal Audits

Employers have long received complaints of workplace misconduct including harassment, discrimination, theft, fraud, and other workplace misconduct. To mitigate litigation risk as well as improve workplace efficiency, companies are increasingly looking to internal workplace investigations to discover, address, and prevent any workplace problems. These investigations are one tool employers can use to determine whether an allegation has merit and who the key players in the allegation(s) are. Such investigations also allow employers to implement preventative steps to avoid future similar workplace or employee incidents. In addition, some allegations by employees, such as harassment, place an obligation on an employer to investigate the allegation in order to be able to use a certain defense in the event the issue results in litigation.[62] Under EEOC's guidance, employers are obligated to investigate harassment complaints made to management regardless of the method by which the complaint was made.[63] Any complaint made to management, whether in writing, orally, or through the company's internal formal process, must be investigated.

In addition to the employer benefits gained from conducting an internal investigation, these prompt responses to employees' concerns about their work environment are often the best way to avoid litigation. Employees who feel as though their employer has heard and addressed their complaints are typically less likely to seek redress in court. Despite all the benefits of these investigations, ineffectively conducted investigations can both exacerbate the underlying problem being investigated, as well as create independent grounds for litigation and liability.

Available Protections During Investigations

There are two main protections available to prevent disclosure of information and communications discovered or relating to an internal investigation: attorney-client privilege and the work product doctrine. The attorney-client privilege is a form of privilege that protects confidential communications between an attorney and a client that are made for the purpose of obtaining or providing legal advice, from disclosure to a third party.[64] Attorney-client privileged communications include a client's request for legal advice, facts necessary to provide that advice, and the ultimate legal advice given.[65] The main purpose of this privilege is to encourage clients to provide all the necessary facts to their attorney, without hesitation, so an attorney can provide the most comprehensive advice possible. The attorney-client privilege has the advantage

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of providing absolute protection under the right circumstances and protecting communications outside of the context of litigation or anticipated litigation. However, in-house counsel must keep in mind that the privilege is fragile, difficult to create, and easily lost by even one minor disclosure.

The second type of privilege, the work product doctrine, is broader than the attorney-client privilege in that the client or the attorney can create work product and that work product can be shared with friendly third parties without causing a waiver on the privilege. However, the work product doctrine is also narrower than the attorney-client privilege because it only protects documents created when the client reasonably anticipates litigation and whose creation is motivated by that reasonably anticipated litigation. When determining whether a document is protected under this doctrine, the court must determine "whether, in light of the nature of the document or the factual situation in a particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[66] To be protected under the doctrine, the document must have been created for use at trial or because the party or an attorney reasonably anticipated litigation would occur and prepared the document under that motivation.[67]

The creation of a company document without anticipating litigation does not qualify the document as privileged.[68] "The work product doctrine is codified in part in [Federal Rule of Civil Procedure] 26(b)(3), which provides that a party is not entitled to obtain discovery of 'documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative' unless the party shows substantial need and an inability to obtain the substantial equivalent of the documents without undue hardship."[69] "Thus, the work product protection does not apply to 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation . . . [e]ven if such documents might also help in preparation for litigation. . . .'"[70]

Maintaining Privilege

If conducted properly, an investigation can help an employer avoid litigation entirely or, when litigation is unavoidable, position an employer for a strong defense. There are, however, potential litigation risks associated with conducting investigations, including the waiver of privilege and the discovery and disclosure of negative or harmful employer information. One of the biggest concerns employers face regarding investigations in response to allegations is the likelihood materials will become discoverable in any future litigation. To start, attorney-client privilege is far from absolute. The disclosure of privileged communications to *anyone* outside the attorney-client relationship can waive the privilege associated with those communications. This includes disclosure of the communication or information to consultants, outside auditors, banks, and even the government. Employers must be especially careful when an in-house attorney plays both a business and a legal role. Because in-house lawyers are often involved in all aspects of a company's affairs, including advising management on business decisions, they generally must carry a heavier burden of proof than outside lawyers in showing that their communications deserve attorney-client privilege protection because the communications might also include information about business decisions that are not subject to the privilege.

The courts have held that in the context of investigations, attorney-client privilege may not apply if the court deems the attorney to have been conducting the investigation primarily for a business purpose, rather than in the attorney's legal role.[71] The privilege will remain in the context of an internal investigation if "one of the significant purposes of the internal investigation was to obtain or provide legal advice."[72] Privilege still can protect a company's internal investigation as long as the need for legal advice was one of the "primary" or a "significant" motivating purpose, even if it is not the exclusive purpose.[73]

The work product doctrine was also challenged in 2015 when a federal district court held that an employer's internal investigation and subsequent report were not subject to work product protection because the report did not contain opinions or mental impressions of the company's attorney, and the investigation was generated in the ordinary course of business and part of an ongoing compliance program.[74] Employers should be cautious when conducting investigations that the investigation is not a part of a regular business practice or ongoing compliance program, which can waive the work product privilege of the notes, documents, and communications of the investigation.

Additionally, properly defining the "client" underlies any analysis of a lawyer's duties of loyalty and confidentiality and can dramatically affect the analysis as to whether any privilege applies because attorney-client privilege can only attach to communications between a lawyer and their client. Every state recognizes that corporations can enjoy an attorney-client relationship with lawyers, including the benefit of privilege protection; however, generally the client is the company and not individual employees of the company.[75] To determine exactly who the "client" is in a corporate scenario, most courts utilize the *Upjohn* test to

avoid any scenario where a company employee can claim that in-house counsel represented them in an individual capacity during an internal investigation. Under *Upjohn*, a corporation can assert privilege over communications between its lawyers and corporate employees, regardless of the employee's rank within the company, as long as the communications at issue were made by corporate employees to counsel at the direction of corporate superiors in order to secure legal advice from counsel, and employees were aware that they were being questioned so that the corporation could obtain legal advice.[76] Because the definition of an attorney-client relationship between company employees and the in-house counsel is fact specific, lawyers generally should provide the employee with an "*Upjohn* warning." This warning details that the lawyer represents the company, the lawyer has been asked to provide legal advice to the company, the employee has information the lawyer needs that is not readily available elsewhere, and all communications with the company's lawyer should be kept confidential, even to fellow company employees.[77]

Practical Advice for Employers

Gray areas and ambiguity exist when applying traditional notions of attorney-client privilege and the work product doctrine to internal investigations within an employer. There are a few things employers can do to help protect information and documents gathered during the investigation from being turned over in any subsequent litigation. Companies should involve in-house lawyers in the investigation as soon as possible. This can help ensure other employees of the company do not prepare documents emphasizing the business rather than the legal or litigation purpose of the investigation. Employers want to ensure the reasons for the investigation are clearly articulated, and if the investigation is conducted in anticipation of litigation, that should be made clear to help ensure the protection of privilege. Employers also garner a better chance of protecting their internal investigations as privileged or as work product if they separately conduct an unprivileged investigation as required through their ordinary course of business.[78] Employers should also consider using an external or outside attorney to conduct the investigation, which creates a stronger presumption that the privilege attaches to the investigation because unlike in-house attorneys, they are often not providing business advice along with their legal advice.

Next, employers should try to avoid including any business recommendations in an investigation report as it can weaken any privilege or work product claim because it undercuts the argument that the internal corporate investigation was primarily motivated by the company's need for legal advice, or primarily motivated by anticipated litigation. Additionally, employers should be aware that claiming an internal investigation was started due to litigation concerns—thereby invoking the work product protection as of a certain date—could potentially trigger the obligation to start preserving pertinent documents as of that date. Employers should also take note that merely copying an attorney on the e-mail communication or writing the words "privileged" or "work product" in a document does not ensure that the privilege will hold. The document still must meet the requirements of the privilege to be able to sustain the argued privilege.

Employers that interview employees in a unionized workplace as a part of an internal investigation face particular challenges that must be noted for employers. In addition to ensuring compliance with the specific rights enumerated in any collective bargaining agreement, employers must take special precautions to avoid infringing on those employees' rights under the NLRA. Different protections apply depending on whether an employer conducts an investigation preparing for employee discipline or litigation. Employers of unionized employees must take steps to avoid conducting an unlawful investigation under the NLRA or infringing on employees' Section 7 rights, including the participation in protected concerted activity. In a 2013 NLRB Advice Memorandum, the NLRB stated:

> An employer violates Section 8(a)(1) when it maintains a work rule that reasonably chills employees in the exercise of their Section 7 rights. Employees have a Section 7 right to discuss discipline or disciplinary investigations involving their fellow employees. An employer may prohibit employees' discussions during an investigation only if it demonstrates that it has a legitimate and substantial business justification that outweighs the Section 7 right.[79]

Employers should be cognizant of the protections afforded to unionized and nonunionized workers under the NLRA and ensure their investigations are compliant with their own internal policies, as well as those under the NLRA.

Finally, when an employer or an outside attorney is conducting interviews during an internal investigation, they should ensure they conduct the interview in a confidential setting without the presence of additional individuals who are not absolutely necessary to the conduct of the interview. The interviewer should remind the employees that in-house counsel represents the company, and not the employees; explain that they are interviewing the employees to obtain facts that the lawyers need to provide legal advice to the company; and request that employees cooperate fully in the investigation. If the interviewer has any concerns that disclosure of a particular piece of information may result in a waiver of privilege, the interviewer should also request that the employee keep that piece of information confidential. Counsel should be mindful, however, that a blanket request that the employee not disclose any information about the interview may not be proper.

Multiple Generations in the Workplace

Dress Codes and Appearance

Many employers include dress code policies in their employee handbooks. Depending on the nature of the business, these dress codes can range from the general to the very specific. For example, the dress code for a typical office environment may simply state that the code is "business casual" and provide examples of articles of clothing that fit the standard—e.g., slacks, skirts, dresses, blouses, collared shirts or button-down shirts, no jeans, professional footwear. On the other hand, the dress code for a hospitality-industry employer—for example, an upscale luxury hotel—may be more specific, requiring suits of a particular color and ties for men; dresses or skirts only for women, with panty hose and high heels to be worn at all times; and no facial piercings or visible tattoos. Still another example of a specific dress code may be found in the handbook of a construction-industry employer, where certain field employees are required to wear steel-toed boots, work pants, and hard hats in certain areas. While employers think that such dress codes are up to their discretion based on their business, there are legal risks in specific dress codes, especially those that focus more on the appearance of women than men, as well as those that address hairstyles, piercings, tattoos, and other forms of expression. These risks are greater in environments with multigenerational employees, where younger employees are more likely to want to use their physical appearance as an expression of their identity.[80]

Legal Considerations—Personal Appearance/ Hair Discrimination

Employers promulgating dress code policies that require a "professional" appearance have been found to embrace a Euro-centric norm for the concept of "professional." Such policies may prohibit long hair for men and cornrows, twists, braids, locs (or "dreadlocks"), afros, or other natural hairstyles for Black or African American employees.

Title VII does not address hairstyles or personal appearance expressly, but rather makes it unlawful for employers to discriminate on the basis of race or national origin. The EEOC has taken the position that the prohibitions on race and national origin discrimination should be interpreted to apply to physical characteristics, such as a person's hair, and "cultural characteristics," such as a person's grooming practices.[81] The EEOC has further indicated that an employer can impose the same dress code and "neutral hairstyle rules" on all workers, so long as these rules are enforced evenhandedly on all employees, regardless of race or ethnicity, and that they respect racial differences in hair textures.[82]

Despite the EEOC's guidance, federal courts generally have refused to interpret Title VII in a way that addresses personal appearance and hairstyle in particular. For example, in *EEOC v. Catastrophe Management Solutions*,[83] the Eleventh Circuit upheld the lower court's dismissal of an African American plaintiff's claim of race discrimination based on a company's requirement that she cut off her dreadlocks in order to be hired. The court reasoned that Title VII prohibited discrimination based on *immutable* characteristics of race, such as hair texture, but not on *mutable* characteristics, such as a hairstyle, or more generally cultural practices.[84] In this case, the employer had a race-neutral policy that required professional attire and prohibited "excessive hairstyles."[85] The court found that this race-neutral policy, to the extent it permitted the company to prohibit dreadlocks in the workplace, did not constitute race discrimination because the plaintiff's choice of hairstyle, even if linked to her culture, was not an immutable characteristic of her race.[86] In so holding, the court cited to other federal court decisions that had similarly rejected the argument that Title VII protects hairstyles culturally associated with race.[87]

Although the federal courts have generally been unwilling to embrace discrimination claims based on hairstyle or other elements of personal appearance, states are beginning to do just that. The District of Columbia Human Rights Act, a Title VII analogue for the nation's capital, has for years prohibited discrimination on the basis of "personal appearance."[88] The statute defines "personal appearance" as "the outward appearance of any person, irrespective of sex, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming, including, but not limited to, hair style and beards."[89] However, employers may apply standards that restrict personal appearance where "such bodily conditions or characteristics, style, or manner of dress or personal grooming presents a danger to the health, welfare or safety of any individual."[90] More recently, several states and metropolitan areas have begun to expressly protect employees from hairstyle discrimination. The New York City Commission on Human Rights, which enforces the New York City Human Rights Law (NYCHRL) (which is in addition to, and separate from, New York State's human rights law), began the wave of new protections when it issued a 10-page Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (Legal Guidance) in February 2019.[91] The Commission details the background of natural hair textures and hairstyles associated with Black people and takes the firm position that the NYCHRL "protects the rights of New Yorkers to maintain natural hair or hairstyles that are closely associated with their racial, ethnic, or cultural identities. For Black people, this includes the right to maintain natural hair, treated or untreated hairstyles such as locs, cornrows, twists, braids, Bantu knots, fades, Afros, and/or the right to keep hair in an uncut or untrimmed state."[92] These protections apply in the employment context as well as public accommodations—the discussion of the latter focusing on schools forcing African American children to change their hairstyles.

In the employment context, the Legal Guidance provides examples of discriminatory hairstyle or dress code

policies, as well as unlawful hairstyle-based racial harassment. For example, it explains that employers may not establish grooming policies that (1) prohibit twists, locs, braids, cornrows, Afros, Bantu knots, or fades, which are commonly associated with Black people; (2) require employees to alter the state of their hair to conform to the company's appearance standards, including having to straighten or relax hair (i.e., use chemicals or heat); or (3) ban hair that extends a certain number of inches from the scalp, "thereby limiting Afros."[93] In addition, the Legal Guidance cautions employers against taking actions with respect to African American employees' hairstyles that amount to race-based harassment, such as forcing Black employees to obtain supervisory approval prior to changing hairstyles but not imposing the same requirement on other employees, requiring only Black employees to alter or cut their hair or risk losing their jobs, prohibiting Black employees with certain hairstyles from being in customer-facing roles, or mandating that Black employees hide their hair or hairstyle with a hat or visor.[94] Finally, the Legal Guidance advises employers that when they encounter a legitimate safety concern relating to a particular employee's hairstyle, they must consider alternative ways to meet that concern prior to imposing a ban or restriction on the hairstyle, such as the use of hair ties, hair nets, head coverings, or alternative safety equipment that can accommodate various hair textures and hairstyles.[95]

In 2019, California became the first state to ban hairstyle discrimination. On July 3, 2019, Governor Newsom signed into law Senate Bill 188, known as the CROWN Act (Create a Respectful and Open Workplace for Natural Hair), which amends both the Fair Employment and Housing Act (FEHA) and the state's Education Code to provide protections against discrimination based on "traits historically associated with race."[96] The new law, which came into effect on January 1, 2020, added a specific provision to the FEHA (the law banning race discrimination in employment in California) stating that "race" includes traits historically associated with race, "including, but not limited to, hair texture and protective hairstyles," and further defines "protective hairstyles" to include braids, locks, and twists.[97] The preamble to SB 188 points to the "societal understanding of professionalism" as being Euro-centric, and explains that workplace dress code and grooming policies that prohibit natural hair have a disparate impact on Black individuals.[98] In a press release issued on July 3, the governor clarified that employers may still maintain dress and grooming policies that are nondiscriminatory and have no disparate impact. For example, employers can still require employees to secure their hair for safety or hygienic reasons.[99]

Just a few days after the California law was signed, the State of New York followed suit, amending the New York State Human Rights Law in a manner similar to the California FEHA, to add "traits historically associated with race, including but not limited to, hair texture and protective hairstyles" to its definition of race for purposes of employment discrimination.[100] "Protective hairstyles" is defined the same way as the term is defined under California law—i.e., to include, but not be limited to, braids, locks, and twists.[101]

Importantly, both the New York State and California laws broadly protect against discrimination based on traits historically associated with race, not just hair. Therefore, although the laws were inspired by discrimination against hairstyles associated with Black or African American culture and people, the statutes may be interpreted to prohibit discrimination on other traits as yet unidentified. Employers in these jurisdictions need to ensure that their dress code and grooming policies, and their daily practices, do not expressly or implicitly discriminate or harass African American employees based on their hair texture or hairstyles. Employers should also consider that such policies and practices respect other personal traits that may be associated with race—and, notably, not simply African Americans, but employees of other races as well.

Following the lead of New York and California, similar legislation protecting against hairstyle discrimination is pending in Illinois, Kentucky, Michigan, New Jersey, Tennessee, and Wisconsin. In October 2019, the Cincinnati City Council also voted 7-1 in favor of legislation banning discrimination against natural hairstyles.

Telework and the ADA

As millennials are increasing in numbers in the workforce, they are putting pressure on employers to structure the daily work environment and responsibilities in a way that suits their sensibilities. In particular, many younger workers want the ability to work from home regularly and freely, with limited or no restrictions. Depending on the industry, regular telework may or may not be possible. Certainly, some jobs require an employee's presence in the workplace (retail work, field construction work, etc.). But even if it is technically feasible, should all office/white-collar employees have the option to work at home as they see fit?

Many issues, both practical and legal, arise from employee demands for regular telework. To begin, employers are concerned about the ability to manage performance and/or build a relationship with an employee when the employee is rarely in the office. Daily interpersonal interactions, including both in-person meetings and casual run-ins in the hallway or break room, can foster positive relationships in the workplace, which in turn builds morale. Moreover, it is simply harder to monitor an employee's work performance when he/she is not in the office. Managers cannot tell when the employee is working, how much time he/she spends on a particular task, and how efficiently he/she is performing. In addition, there may be a generational divide with respect to this issue, with older supervisors or managers having an expectation that work should be performed at the office and valuing the concept of "face time" to show dedication

There may be a generational divide with respect to telework, with older managers expecting work to be performed at the office and valuing "face time" to show dedication, and younger employees believing that work can be done from anywhere.

to the company, whereas younger employees believe that so long as the work is performed well, it can be done from anywhere.

In addition to these practical concerns, employers should consider the legal issues surrounding telework, especially relating to employees with disabilities. Under the Americans with Disabilities Act, the restructuring of an employee's job, including the ability to work from home, may be a "reasonable accommodation" for a disabled employee that would allow him/her to perform the essential duties of the position.[102] The EEOC's guidance regarding telework/work at home as a reasonable accommodation indicates that if employers provide telework as an option to all employees, the option must also be available to disabled employees.[103] Moreover, even if telework is not an option available to all employees, an employer must consider telework as a possible reasonable accommodation for a disabled employee if it would assist the employee to perform his/her job.[104]

Employers should be careful about their response to a request for telework as an accommodation for a disabled employee. That is, if an employer has allowed telework for a nondisabled employee who holds a similar job to the disabled employee—even in a single, specific situation due to the circumstances of the nondisabled employee—it would be hard-pressed to state that telework cannot be an option for the disabled employee. Employers should consider telework requests from disabled employees as they would any other request for an accommodation, analyzing the various relevant factors to determine if the request is reasonable—such as whether all essential elements of the employee's job can be performed from home, whether the employee's absence from the office impacts other employees or the business in a negative way (for example, whether face-to-face interaction is required with other employees or customers/clients), and whether the employee can be adequately directed and/or supervised while at home.[105] The employer need not accept a request for full-time, indefinite telework without justification for why such an arrangement would be necessary to allow the disabled employee to perform his/her job. In other words, employers should engage in the interactive process to determine how working from home helps the employee, how many days/hours it is necessary, how long it is necessary, and whether there is some accommodation other than telework that may assist the employee in performing his/her essential duties.[106]

For employers who provide telework arrangements to any employee—disabled or not—it is important to document all terms of the arrangement in a telework agreement. For nondisabled employees, the employer may wish to require that employees work for a specified period of time—typically anywhere from three months to one year—in the office before being able to begin a regular telework arrangement. In addition, employers may wish to require employees to have had at least one positive—or at least satisfactory—performance review prior to entering any telework arrangement. These kinds of eligibility requirements allow the employer to feel a level of comfort that they are not taking a risk on a new employee with no established track record. However, where the telework arrangement is necessitated by an employee's disability, these eligibility requirements would need to be waived.[107]

The written telework agreement should state on which days and during which hours employees may work from home and clarify that all performance expectations will be the same during any periods of telework as they would be if the employee was in the office, including expectations regarding the employee's availability for and participation in meetings, telephone calls, and other communications. Such agreements should also restate any at-will employment relationship and allow for review of the telework arrangement periodically to ensure it is still working for both parties, and to allow for modification as needed. For disabled employees, this review may coincide with any information provided by the employee's medical provider about how long the telework arrangement may be necessary, and any medical updates that may be provided over the course of the arrangement regarding the employee's condition. Finally, the telework agreement should provide both sides the opportunity to terminate the telework arrangement with appropriate notice periods. However, in the case of employer termination of a disabled employee's telework agreement, the employer would have to be able to prove that continuation of the telework arrangement poses an undue hardship, a high standard to meet. Employers would be advised to meet with any disabled employees with a telework arrangement before terminating the arrangement to discuss whether modifications may be made that might allow the employee to perform his/her job without posing an undue hardship on the employer—for example, perhaps the hours or days of telework could be modified or reduced, or the employee could commit to a gradual shift from telework to office work, as his/her condition improves.

Supplemental Comment Regarding COVID-19

This article was first drafted for publication in January 2020. Therefore, this section does not address the

teleworking advancements that have developed in light of the COVID-19 pandemic, which began in March 2020. When the pandemic subsides, the issue of continued telework or telework as a reasonable accommodation is likely to be a hot topic. Arguments will be made by employees (and their attorneys) that months of teleworking during the pandemic demonstrate that telework is (a) possible and (b) a reasonable accommodation that ought to be considered for many office jobs. Additionally, the fact that a broad spectrum of individuals regardless of age or technological savvy were forced to learn platforms like Zoom, Microsoft Teams, WebEx, etc., means that many employers will be more likely to consider telework in the future. It is also possible, though, that months of teleworking will lead to reduced productivity and have a negative impact on company culture. So, some employers may argue that while telework may be appropriate in situations where it is the only feasible way to continue basic business operations during a pandemic, telework is not something that should be allowed as a matter of course and may pose an undue hardship on an employer. In other words, there is more to come on this topic in the future!

Telework and OSHA

In addition to both practical concerns and ADA issues surrounding telework, employers may fear that allowing employees to work from home exposes them to liability under the OSH Act for any workplace injuries that occur in the home. OSHA's stance on the OSH Act's application to home offices has changed over time, and fortunately for employers, OSHA has now taken the position that the OSH Act does **not** apply to home offices. In the late 1990s, OSHA issued guidance indicating that the OSH Act **did** apply to home offices.[108] But in response to uproar and confusion from employers and the community at large, OSHA reversed course. On Feb. 25, 2000, OSHA issued Instruction CPL 2-0.125 regarding "Home-Based Worksites,"[109] which stated in pertinent part:

> OSHA will not conduct inspections of employees' home offices.
>
> OSHA will not hold employers liable for employees' home offices, and does not expect employers to inspect the home offices of their employees.
>
> If OSHA receives a complaint about a home office, the complainant will be advised of OSHA's policy. If the employee makes a specific request, OSHA may informally let the employer know of complaints about home office conditions, but it will not follow up with the employer or employee.[110]

OSHA takes a slightly different position with home manufacturing spaces or other home work spaces that are not simply offices, but such facilities are rare. Employers are responsible in non-office home worksites for hazards caused by materials, equipment, or work processes that the employer provides or requires to be used in an employee's home.[111] In these kinds of worksites, OSHA will only conduct inspections when it receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality.[112] Although home offices are not a priority for OSHA, employers should nevertheless ensure that their employees who work from home commit to establishing a safe environment for themselves. While it is not necessary to comply with specific requirements relating to OSHA-regulated items such as smoke detectors and ergonomically correct workstations, employers should include terms in any telework agreement with employees requiring them to work at a proper desk that allows them to sit or stand as they see fit, to keep their office area free of stray cords and other hazards, and to report any injuries that they may suffer in their home office space while working from home.

Employee and Employer Recordings

Additionally, workplace recording has made headlines in recent years. In 2018, President Trump encountered secret recordings made by two of his former confidants—his lawyer, Michael Cohen, and his former staffer, Omarosa Manigault-Newman. With the advent and prevalence of smartphones, recording in the workplace is easier than it has ever been. Employees often attempt to record conversations with their supervisors or Human Resources when they believe that they may be subject to discipline. In addition, employees may capture the setting and circumstances surrounding any workplace accident as evidence of unsafe conditions in the work environment. While recordings in the workplace may be useful in resolving disputed facts about conversations and events, surreptitious recording by both employees and employers creates legal and business risks. On the other hand, employers' efforts to prohibit recordings have also been fraught with legal land mines over the years.

Depending on the jurisdiction, secretly recording a conversation with a co-worker may violate state laws. Currently, 12 states prohibit recording a conversation without the consent of all parties to the conversation.[113] In addition to individual liability of an employee recording a conversation without consent, an employer may be liable for violating such state wiretap laws if, for example, a supervisor was directed to record a conversation with an employee. All-party consent laws generally recognize an exception for recording an in-person conversation where there is no expectation of privacy. However, employers should assume that there are areas with an expectation of privacy in the workplace. Certain areas of the workplace, such as an employee's private office, changing room, or restroom, may create a reasonable expectation that conversations that occur in those spaces are private. On the other hand, a conversation between two individuals in a

busy lunchroom where employees are in and out regularly is not likely a "private conversation" where one or both parties can maintain an expectation of privacy.

The majority of states have one-party consent laws, meaning that one party to a conversation may lawfully record his/her conversation with another individual. However, even in these states, employers should tread lightly with respect to recording. For example, a supervisor could secretly record a conversation between himself/herself and a subordinate without running afoul of a one-party consent law. But the supervisor could not install an audio or video recording device in the subordinate's office to record his/her conversations with others because the device would capture conversations between the subordinate and other employees, to which the supervisor is not a party, without consent.

Due to the possible legal risks of recording in the workplace, and employers' general discomfort with having conversations involving supervisors and Human Resources recorded without their knowledge, many employers institute policies prohibiting recordings in the workplace. In the past, these policies were generally held to run afoul of the NLRA. But a recent decision by the National Labor Relations Board (NLRB) has changed the landscape of recording policies in the workplace.

Many employers believe that the NLRA[114] applies only to employers with unionized employees. Although Section 7 of the NLRA does contain provisions that allow for union organizing in the workplace,[115] the very same statutory section also allows employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection."[116] These so-called "Section 7 rights" apply to all nonsupervisory employees in any workforce in the United States, unionized or not, with limited exceptions.[117]

In the landmark case of *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village-Livonia and Vivian A. Foreman* (*Lutheran Heritage*),[118] the NLRB addressed whether certain workplace rules "reasonably tend[ed] to chill employees in the exercise of their Section 7 rights."[119] The Board held that if a rule does not expressly restrict activity protected by Section 7, it can still violate the NLRA if: (1) employees would "reasonably construe" the language to prohibit Section 7 activity, (2) the rule was promulgated in response to union activity, or (3) the rule has been applied to restrict the exercise of Section 7 rights.[120] NLRB's holding in *Lutheran Heritage* did not address any workplace recording rules, but the three-part standard set forth in that case for analyzing facially neutral workplace rules was applied time and time again during the Obama administration to invalidate facially neutral workplace rules, such as rules regarding disclosure of confidential information, conduct between employees, workplace recording, and the use of social media. Indeed, in 2015, the General Counsel of the NLRB issued a memorandum describing the many ways that employer rules could run afoul of the *Lutheran Heritage* standard.[121]

In December 2017, a more conservative, Trump-era NLRB overruled the *Lutheran Heritage* three-prong test regarding facially neutral workplace rules, in the landmark decision *The Boeing Co. and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001 (Boeing)*.[122] In *Boeing*, the NLRB established a new, two-pronged test for evaluating facially neutral workplace rules, analyzing (1) the nature and extent of the potential impact on NLRA rights and (2) the legitimate justifications associated with the rule.[123] Under this standard, the NLRB created three categories of policies and rules.[124] Category 1 rules are those that the NLRB designates as lawful, either because (i) when reasonably interpreted, the rule does not prohibit or interfere with the exercise of NLRA rights, or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.[125] Category 2 rules are those that warrant individualized scrutiny to determine whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.[126] Finally, Category 3 rules are those that the NLRB will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule.[127]

The *Boeing* case addressed a workplace rule that restricted the use of camera-enabled devices, such as cell phones, on its property, due to the highly sensitive and often classified work being performed at Boeing's facilities.[128] The Board found that Boeing's "no-camera" rule was a Category 1 rule under its new standard, and that any potential adverse impact on Section 7 rights was outweighed by the employer's justifications for the rule, which included ensuring that Boeing remains compliant with federal government protocols and duties to prevent the disclosure of export-controlled and proprietary information.[129]

Following the *Boeing* decision, the General Counsel of the NLRB issued a new memorandum that effectively rescinded the prior 2015 memorandum, in which it provided guidance about the promulgation of workplace rules in the aftermath of *Boeing*.[130] In this memorandum, the General Counsel explained that no-recording rules, like the no-camera rule in *Boeing*, should fall within Category 1 because employers have a "legitimate and substantial interest in limiting recording and photography on their property," involving security concerns, property protection, and protection of proprietary and customer information, and maintaining the integrity of operations.[131] Moreover, given these substantial interests, and the small risk that such rules would interfere with peripheral NLRA-protected activity (such as taking pictures of workplace conditions as part of a larger protected concerted campaign), such rules are "always lawful."[132]

In light of *Boeing*, employers may consider including no-recording rules in employee handbooks once again,

but employers are well-advised to tread lightly in all workplace rules that may chill Section 7 activity. To begin, even facially neutral rules may run afoul of the NRLA if they are applied in a manner that targets employees engaged in protected, concerted activity, or if the business justifications do not outweigh the risks of chilling Section 7 activity. Moreover, the guidance in the General Counsel's memorandum does not have the force of an NLRB or court decision, and *Boeing* only addressed the validity of a no-camera rule, not other workplace rules. Still, it is likely that the current NLRB will follow the General Counsel's guidance when faced with other workplace rules, and employers may find some relief from the clarity of the new standard.

OSHA can pursue videotaping during the course of an OSHA inspection.[133] "OSHA's use of videotaping to investigate work practices and procedures that might be harmful is authorized by 29 C.F.R. § 1903.7 which permits 'photographing' and other 'reasonable investigative techniques.'"[134] If an employer denies OSHA taking video, OSHA can consider this a denial of entry into the workplace and seek a warrant from the court. Employers can seek protections from disclosure of trade secret material.[135]

Emotional Support Animals

The "general duty clause" of the OSH Act provides that "each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[136] "Congress quite clearly did not intend the general duty clause to impose strict liability."[137] "Freakish and unforeseeable" circumstances cannot "trigger statutory liability under the general duty clause."[138] The OSH Act does not require employers to provide "certainty" or to eliminate all "inherent" risks, but only to take "reasonable precautionary steps" against "foreseeable" hazards.[139]

In order for an emotional support animal to become a concern, the employer would need to have notice that the animal presents a danger at the worksite. The OSH Act considers a degree of foreseeability with potential hazards. So, if an animal was at the worksite and had become aggressive previously, then that could be a form of notice of the potential in the future. However, if the animal had not presented as potentially aggressive or engaged in any prior behaviors, it would be difficult for OSHA to establish that the employer had notice of this conduct such that it should have recognized the hazard.

Employees, and especially younger employees, are increasingly asking for the ability to bring support animals into the workplace and in other public spaces. Such animals invariably open up the question of reasonable accommodations and to what lengths an employer is required to go in order to accommodate an employee with a medical condition. The Americans with Disabilities Act (ADA)[140] is implicated with respect to support animals in both employment and public spaces.

Title I of the ADA[141] is applicable to private employers. It is the section of the law that requires employers not to discriminate against qualified, disabled applicants or employees, and to provide reasonable accommodations to enable such applicants to apply for a job, or to enable such employees to perform the essential functions of their job, so long as the accommodation does not impose an undue hardship.[142] Title II of the ADA applies to state and local governmental entities.[143] Title III of the ADA applies to public accommodations and is the section of the law that requires businesses that are open to the public—such as retail stores, hotels, office buildings, etc.—to be accessible to people with disabilities.[144] Under the ADA, an individual is "disabled" if he or she suffers from a mental or physical impairment that "substantially limits" one or more of the individual's major life activities.[145] Major life activities include, but are not limited to, caring for oneself, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working, as well as the operation of a major bodily function, such as the functions of the immune system, digestive system, neurological functioning, the circulatory system, or reproductive system.[146] Title I requires employers to provide reasonable accommodations to disabled employees to enable them to perform their essential job functions. Examples of typical accommodations include leave, reassignment, job restructuring, modification to equipment used for work, provision of readers or interpreters, part-time or light-duty work, etc.[147] An accommodation is *unreasonable* if it creates an undue hardship on the employer, meaning that the action requires significant difficulty or expense, when considered in light of factors such as (i) the nature and cost of the accommodation needed; (ii) the overall financial resources of the facility involved and the employer, the number of persons employed, the overall size of the business covered, and the effect on expenses and resources, etc.; and (iii) the type of operation of the employer.[148] Moreover, an employer has a defense to a discrimination claim (including a claim of failure to accommodate) if the action required of the employer would create a direct threat to individuals in the workplace—i.e., a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.[149]

Title I makes no mention of service animals as a form of reasonable accommodation for disabled employees. Interestingly, however, the regulations implementing Titles II and III of the ADA do reference "service animals." But service animals are limited specifically to dogs and, more recently, miniature horses, in each case that have been individually trained to do work or perform tasks for individuals with disabilities.[150] None of the titles of the ADA reference the concept of "support animals" or specifically "emotional support animals." No species of animal other than a dog or horse is recognized as a "service animal" for purposes of Titles II and III. Thus,

public accommodations are not required to allow individuals to bring support animals or "service" animals other than dogs or miniature horses into the accommodation.

Title I, on the other hand, presents a different situation. Despite the absence of "service animals" in Title I of the ADA, employers routinely accommodate dogs as service animals for disabled employees where doing so does not create an undue hardship. This is because Title I does not place limits on the kinds of accommodations that may be reasonable. Accordingly, employees can argue that a service dog is a reasonable accommodation that will allow them to perform their job in certain circumstances. For example, a visually impaired employee who works in an office may use a service dog to help her navigate the workplace, where the dog does not impose an undue burden but simply sits at her feet while she performs her work. The regulations regarding service animals in Title II and Title III of the ADA do not have a bearing on how a private employer should respond to a request for accommodation where the range of accommodations in employment is unlimited, so long as they are reasonable and do not create undue hardship. Moreover, the logical extension of the absence of limitations on the kinds of reasonable accommodations available under Title I is that employees can claim that animals other than dogs or miniature horses that have been trained to assist them are reasonable accommodations. Similarly, employees could claim that "emotional support" or "comfort" animals that have not been trained but that provide emotional assistance to the employees are also reasonable accommodations. Therefore, employees can claim that reptiles, birds, pigs, or any other variety of animal provides them the comfort that they need to be able to perform their jobs.

Employers faced with such requests should analyze them the way that they would analyze any other accommodation request. The ADA requires employers to undertake an "interactive process," whereby they can learn information about the employee's disability and which accommodations may effectively assist the employee, and then determine whether the requested accommodation is one that the employer can provide without suffering undue hardship.[151] The employer does not have to provide the accommodation requested by the employee if another available accommodation that is preferable to the employer would effectively assist the employee in performing his/her job.[152] As part of this process, and especially where the alleged disability is not visible, an employer is permitted to request information from the employee's physician to better understand the nature of the disability and why a particular accommodation is being requested.[153]

Thus, if an employee requests the ability to bring any sort of animal to work, the employer is entitled to understand the employee's medical condition that forms the basis for the request (for example, visual or hearing impairment, diabetes, post-traumatic stress disorder, depression, anxiety) and to receive documentation from the employee's doctor supporting it. The employer may also be able to request a certification supporting the animal's role as a service or support animal to determine what it can and cannot do and how it assists the employee. But even if the employee provides proof of a medical condition and the support provided by the animal, the employer can still determine whether that accommodation is reasonable in light of its business and the circumstances of the employee's employment. Questions the employer may choose to consider include:

- Is there an appropriate space for the animal in the workplace (does the employee work in a private space with a door, or does he/she move throughout open areas of the office)?
- Are there areas where the employee can tend to the animal's basic needs (e.g., feeding the animal and allowing it to relieve itself)?
- Can the employee take breaks to care for these needs?
- Are there other employees in the office who are allergic to the animal, and if so, are there ways to limit those employees' exposure?
- Is the work environment one where any potential animal-related dirt, allergens, or other contaminants could affect the operations of the business (e.g., does the work environment involve the preparation of food, drugs, or chemicals)?
- Is the animal potentially dangerous?

For example, an employee who works processing food products, and who requests the presence of an animal in the workplace, may likely be denied that request because of the risk to co-workers of an animal roaming the factory floor and the risk to the public from animal contaminants in the food products. In addition, as noted above, safety is always a part of the analysis for a reasonable accommodation, and employers need not take any action that results in a "direct threat" to the health and safety of others. Thus, an employee who requests the presence of an animal that is poisonous or that bites may be denied the request because of the risks to co-workers and others who enter the workplace.

Nevertheless, employers should be careful not to immediately jump to the conclusion that they cannot tolerate the presence of an animal in the workplace and should instead engage in the interactive process and analyze all relevant factors to determine whether the request is based on a legitimate disability, whether the animal can effectively assist the employee to perform his/her job, and whether the animal can be accommodated without posing an undue hardship on the employer.

As the landscape for employment issues changes nationwide, the construction industry is not shielded from the evolving landscape. Clients and employers will be seeking lawyers' counsel as to how to avoid litigation in the era of increased protections for employees and their identities. While federal and state laws are constantly

changing as to protecting employees, it is incumbent on the lawyers representing construction clients to be familiar with the evolution of employee protections in municipalities, states, and federally.

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Endnotes

1. 138 S. Ct. 1612 (2018).
2. 9 U.S.C. §§ 1–16 (2012).
3. 29 U.S.C. §§ 151–169 (2012).
4. 9 U.S.C. § 2.
5. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
6. *See* 29 U.S.C. § 203 (2012).
7. 9 U.S.C. § 2.
8. Epic Sys. Corp. v. Lewis, 38 S. Ct. 1612, 1622 (2018).
9. *See* 29 U.S.C. § 157 (2012).
10. *See Epic Sys. Corp.*, 38 S. Ct. at 1612.
11. *Id.* at 1624.
12. *Id.*
13. *Id.* at 1622 (stating, "[i]t can't because the saving clause recognizes only defenses that apply to 'any' contract. In this way the clause establishes a sort of 'equal-treatment' rule for arbitration contracts.").
14. *Id.* at 1632.
15. 139 S. Ct. 1407 (2019) (holding that compelling arbitration and dismissing underlying claims qualify as a final decision with respect to arbitration under 9 U.S.C. § 16(a)(3)).
16. *Id.*
17. *Id.* at 1417.
18. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) ("class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment"); *Epic Systems Corp.*, 38 S. Ct. at 1630 ("the legislative policy embodied in the NLRA is aimed at 'safeguard[ing], first and foremost, workers' rights to join unions and to engage in collective bargaining'").
19. *Lamps Plus, Inc.*, 139 S. Ct. at 1418 (internal quotation marks and citation omitted).
20. *Id.* at 1416 (internal quotation marks and citation omitted).
21. *Id.*
22. 139 S. Ct. 524 (2019).
23. *Id.* at 529.
24. Pravin R. Patel, *Lamps Plus: Supreme Court Turns out the Lights on Class Arbitration*, Practice Points (Apr. 30, 2019), https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2019/lamps-plus-supreme-court-turns-out-the-lights-on-class-arbitration/.
25. *Id.*
26. *Alternative Dispute Resolution Program*, U.S. Dep't of Lab.: Occupational Safety & Health Admin. (Nov. 20, 2019), https://www.whistleblowers.gov/alternative-dispute.
27. *See* 29 C.F.R § 1977; 20 C.F.R § 1978.
28. *See* Directorate of Whistleblower Prot. Programs (DWPP), Occupational Safety & Health Admin., *Whistleblower Statutes Summary Chart* (Oct. 7, 2019), https://www.whistleblowers.gov/sites/wb/files/2019-10/WB-Statute-Summary-Chart-10.8-Final.pdf.
29. *See* 29 U.S.C. § 660(c) (2012); 49 U.S.C. § 31105 (2012).
30. *See* 5 U.S.C. § 552 (2012).
31. *See* 20 C.F.R. § 1977.18(b).
32. *Id.* § 1977.18(a)(2). *See*, *e.g.*, Boy's Markets, Inc. v. Retail Clerks, 398 U.S. 235 (1970); Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Carey v. Westinghouse Elec. Co., 375 U.S. 261 (1964); Collier Insulated Wire, 192 NLRB No. 150 (1971).
33. 20 C.F.R. § 1977.18(a)(2).
34. 42 U.S.C. § 2000e, et seq. (2012).
35. Bostock v. Clayton Cnty., Ga., 140 S. Ct. 1731 (June 15, 2020); R.G. & G.R. Harris Funeral Homes v. EEOC, Docket No. 18-107 (argued Oct. 8, 2019); Altitude Express, Inc. v. Zarda, Docket No. 17-1623 (argued Oct. 8, 2019).
36. *See* 490 U.S. 228 (1989) (superseded by statute).
37. *See, e.g.*, Evans v. Ga. Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).
38. *See, e.g.*, Roberts v. Clark Cnty. Sch. Dist., 215 F. Supp. 3d 1001 (D. Nev. 2016); EEOC v. R.G. & G.R. Harris Funeral Homes, 884 F.3d 560 (6th Cir. 2018).
39. The following states provide protections against discrimination on the basis of both sexual orientation and gender identity/gender expression: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, Washington, and the District of Columbia. Michigan and Pennsylvania have interpreted existing prohibitions against sex discrimination to include protection for sexual orientation and/or gender identity. Finally, Wisconsin provides protection against discrimination on the basis of sexual orientation, but not gender identity or expression.
40. *R.G. & G.R. Harris Funeral Homes*, Docket No. 18-107.
41. *R.G. & G.R. Harris Funeral Homes*, 884 F.3d at 568, 569.
42. *Id.* at 569.
43. *Id.* at 576.
44. Supreme Court Oral Argument, R.G. & G.R. Harris Funeral Homes v. EEOC, Docket No. 18-107 (argued Oct. 8, 2019), *available at* https://www.oyez.org/cases/2019/18-107 at min. 22:20, 26:36.
45. *Id.* at min. 22:20.
46. 42 U.S.C. § 2000e-2(a)(1)–(2); Respondent's Reply Brief at 22, *R.G. & G.R. Harris Funeral Homes*, Docket No. 18-107 (Sept. 10, 2019).
47. Docket No. 17-1618 (argued Oct. 8, 2019).
48. Docket No. 17-1623 (argued Oct. 8, 2019).
49. *Id.* (male homosexual skydiving instructor challenged his dismissal based upon sexual orientation).

50. *Id.*

51. Respondent Brief at 3, *Altitude Express, Inc.*, Docket No. 17-1623.

52. *Id*. at 4.

53. *Id.* at 6–7.

54. *Id.* at 4–5 (associational discrimination is defined as discrimination against an individual because of the relationship between the individual's sex and the characteristics of others with whom the individual associates).

55. Docket No. 17-1618 (argued Oct. 8, 2019).

56. Petitioner Brief at 5–6*, Bostock*, Docket No. 17-1618.

57. *Id.* at 6.

58. *Id.*

59. *Id.* at 6–9.

60. Obergefell v. Hodges, 576 U.S. 644 (2015).

61. *See A Guide to Restroom Access for Transgender Workers*, Best Practices (OSHA 2016), *available at* https://www.osha.gov/Publications/OSHA3795.pdf.

62. *See* Equal Emp't Opportunity Comm'n, EEOC-CVG-199-2, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), https://www.eeoc.gov/policy/docs/harassment.html.

63. *Id.*

64. *See* Roe v. Cath. Health Initiatives Colo., 281 F.R.D. 632 (D. Colo. 2012).

65. *Id.*

66. Banks v. Off. of Senate Sergeant-at-Arms, 228 F.R.D. 24, 26 (D.D.C. 2005).

67. *Id.* (citing Willingham v. Ashcroft, 2005 WL 873223, at *2 (D.D.C. Apr.15, 2005)).

68. Wultz v. Bank of China Ltd., 304 F.R.D. 384, 393 (S.D.N.Y. 2015).

69. *Id.*

70. *Id.* at 394.

71. *In re* Kellogg Brown & Root, Inc., 756 F.3d 754, 759 (D.C. Cir. 2014).

72. *Id*. at 760.

73. *Id.*

74. Gillespie v. Charter Commc'ns, 133 F. Supp. 3d 1195, 1201 (E.D. Mo. 2015).

75. United States v. Grace, 439 F. Supp. 2d 1125, 1137 (D. Mont. 2006).

76. Upjohn Co. v. United States, 449 U.S. 383 (1981).

77. United States *ex rel*. Parikh v. Premera Blue Cross, 2006 WL 3733783, at *6 (W.D. Wash. Dec. 15, 2006).

78. *See* Patel v. L-3 Commc'ns Holdings, Inc., 2016 WL 4030704, at *1 (S.D.N.Y. July 25, 2016).

79. Barry J. Kearney, Off. of Gen. Counsel, NLRB Advice Memorandum, Verso Paper, Case 30-CA-089350 (Jan. 29, 2013), http://winwinhr.com/wp-content/uploads/2013/04/Blog-Verso_Paper_advice_released_4-16-2013_pdf0.pdf.

80. Restrictive dress codes may pose risks of religious discrimination, such as where an employee is asked not to wear a particular article of clothing or alter his/her personal appearance in a way that interferes with religious beliefs. This topic has been addressed in many papers and addressed extensively by the courts and will not be discussed in detail here.

81. Off. of Legal Counsel, EEOC Compliance Manual, sec. 15: *Race & Color Discrimination* (Apr. 19. 2006), https://www.eeoc.gov/policy/docs/race-color.html#II.

82. *Id.* § 15-VII.

83. 852 F.3d 1018 (11th Cir. 2016).

84. *Id.* at 1030.

85. *Id.* at 1022.

86. *Id.* at 1030–33.

87. *Id.* at 1032–33.

88. D.C. Code § 2-1402.11(a) (2019).

89. *Id.* § 2-1401.02(22).

90. *Id*.

91. N.Y.C. Comm'n on Hum. Rts., Legal Enforcement Guidance on Race Discrimination on the Basis of Hair (Feb. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Hair-Guidance.pdf.

92. *Id.* at 1.

93. *Id.* at 7–8.

94. *Id.* at 8.

95. *Id.*

96. *See* S.B. No. 188, ch. 58 (Cal. July 4, 2019); Cal. Gov't Code § 12926(w).

97. Cal. Gov't Code § 12926(w), (x).

98. Cal. S.B. No. 188, ch. 58, at 1.

99. Press Release, Off. of Governor Gavin Newsom, Governor Newsom Signs Legislation to Protect Employees from Racial Discrimination Based on Hairstyle (July 3, 2019), https://www.gov.ca.gov/2019/07/03/governor-newsom-signs-legislation-to-protect-employees-from-racial-discrimination-based-on-hairstyle/.

100. N.Y. Exec. Law, art. 15, § 292(37) (2014).

101. *Id.* § 292(38).

102. *See* Equal Emp't Opportunity Comm'n, EEOC-NVTA-2003-1, Work at Home/Telework as a Reasonable Accommodation (Dec. 20, 2017), https://www.eeoc.gov/facts/telework.html.

103. *Id.* at question 1.

104. *Id.* at question 2.

105. *Id.* at question 4.

106. *Id.* at questions 3, 5.

107. *Id.* at question 1.

108. U.S. Dep't of Lab., OSHA Standard Interpretations, OSHA Policies Concerning Employees Working at Home (Nov. 15, 1999), https://www.osha.gov/laws-regs/standardinterpretations/1999-11-15.

109. U.S. Dep't of Lab., OSHA Instruction CPL 2-0.125, Home-Based Worksites (Feb. 25, 2000), https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=directives&p_id=2254.

110. *Id.* § IX.

111. *Id.*

112. *Id.* § X.

113. California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington all require the consent of all parties to a conversation for a recording to be lawful.

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(Continued from page 22)

114. 29 U.S.C. § 151 et seq. (2012).

115. *Id*. § 157 (allowing employees to "self-organize" and to "form, join, or assist labor organizations").

116. *Id.*

117. *Id.* at § 151(2), (3). Certain employers such as the U.S. government, state governments, and labor organizations are excluded from coverage. In addition, besides supervisors, the NLRA does not cover domestic workers, certain agricultural workers, and certain other individuals.

118. 343 NLRB No. 75 (Nov. 19, 2004).

119. *Id.*

120. *Id.* at 647.

121. *See* Richard F. Griffin Jr., Off. of Gen. Counsel, Memorandum GC 15-04, Report of the General Counsel Concerning Employer Rules (Mar. 18, 2015), https://www.aaup.org/sites/default/files/NLRB%20Handbook%20Guidance.pdf.

122. 365 NLRB No. 154 (Dec. 14, 2017).

123. *Id.* at *12.

124. *Id.* at *13.

125. *Id.*

126. *Id.* at *13–14.

127. *Id.* at *14.

128. *Id.* at *4.

129. *Id.* at *13, 19–26.

130. Peter B. Robb, Off. of Gen. Counsel, Memorandum GC 18-04, Guidance on Handbook Rules Post-*Boeing* (June 6, 2018).

131. *Id.* at 5–6.

132. *Id.* at 6.

133. *See* OSHA Directive CPL 02-00-163 (Sept. 13, 2019).

134. *See* Reich v. Kelly-Springfield Tire Co., 13 F.3d 1160, 1165 (7th Cir. 1994).

135. *See* 29 U.S.C. § 664; 29 C.F.R. §§ 1903.9, 2200.11, 2200.52(d)(4).

136. *See* 29 U.S.C. § 654(a)(1).

137. Nat'l Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

138. Sec. of Lab. v. Tuscan/Lehigh Dairies, Inc., 2009 WL 3030764 (OSHC July 27, 2009).

139. Brennan v. OSHRC, 494 F.2d 460, 463 (8th Cir. 1974). *See also* Indust. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 642 ("the statute was not designed to require employers to provide absolutely risk-free workplaces whenever it is technologically feasible" but only to reduce "significant risks of harm"); *Nat'l Realty & Constr. Co*., 489 F.2d 1257 ("Congress quite clearly did not intend the general duty clause to impose strict liability."); Pelron Corp., 12 BNA OSHC 1833, 1986 WL 53616, at *3 (No. 82-388).

140. 42 U.S.C. § 12101 et seq. (2012).

141. *Id.* §§ 12111–12117.

142. *Id.* § 12112.

143. *Id.* §§ 12131–12165.

144. *Id.* §§ 12181–12189.

145. *Id.* § 12102(1).

146. *Id.* § 12102(2).

147. *Id.* § 12111(9).

148. *Id.* § 12111(10).

149. *Id.* § 12111(3).

150. 28 C.F.R. §§ 35.104, 36.104 (defining "service animals" as dogs under Title II and Title III, respectively); §§ 35.136, 36.302 (adding "miniature horses" as reasonable accommodations under Title II and Title III, respectively).

151. *See* Equal Emp't Opportunity Comm'n, EEOC-CVG-2003-1, Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act (Oct. 17, 2002), https://www.eeoc.gov/policy/docs/accommodation.html#reasonable.

152. *Id.*

153. *Id.* at question 8.